



Motion in Limine to Exclude Expert Testimony of the City. The order set a deadline of November 15, 2019, for submission of responses.

On November 15, 2019, DWR timely filed DWR's Response in Opposition to GMD2's Renewed Motion in Limine to Exclude Expert Testimony of the City.

On November 15, 2019, the City timely filed the City of Wichita's Response to Equus Beds Groundwater Management District No. 2's Renewed Motion in Limine.

### **Discussion and Conclusions re Admissibility of Supplemented Material in Expert Reports**

In the Order on Prehearing Motions issued July 24, 2019, the District's motion to exclude the City's expert reports was denied, contingent on the City correcting certain deficiencies in their expert reports. The order stated, "the [expert] reports do not identify the respective observations, opinions, or conclusions of any given expert . . . This lack of disclosure could result in unfair surprise to other parties. Therefore, the City must supplement each of its expert reports to provide the opinions and/or conclusions reached by each expert and a summary of the grounds for each." The order further stated, "The district's argument that the City's experts should not be allowed to testify because the allegedly deficient material fails to qualify them as experts and fails to qualify their testimony as helpful or relevant, is moot, contingent on the City providing the supplementation described herein."

The Order on Prehearing Motions, issued July 24, 2019, contained a review of Kansas law applicable to motions to exclude expert reports in the context of administrative hearings. (pgs. 23-24, 26-27.) That review is incorporated by reference herein. In summary, the order reviewed statutes and case law establishing the degree of discretion granted to a presiding officer, as well as the procedural and substantive standards for expert reports. Regarding discretion, a trial court is granted broad discretion in decisions regarding admissibility of evidence, with an administrative hearing officer having at least that much discretion, coupled with the added flexibility inherent in the administrative context.

At the outset, the most fundamental question is which, if any, of the City's expert reports were supplemented in any way. The procedural directive in the Order on Prehearing Motions, required the City to "supplement each of its expert reports to provide the opinions and/or conclusions reached by each expert and a summary of the grounds for each." Thus, if any of the City's previously offered expert reports were not supplemented at all, those reports will not be in compliance with the Order on Prehearing Motions and must be excluded. The City did not submit a supplemented version of the expert reports for Brian Meier, Don Koci, or Alan King. Therefore, in accordance with the Order on Prehearing Motions, the unsupplemented expert reports, and expert testimony, of these three individuals are hereby excluded.



Admissibility of expert reports and testimony involves both procedural and substantive inquiry. K.S.A. 60-226 provides guidance for the procedural standards for expert reports in the administrative setting: the reports are to contain the subject matter on which the expert will testify and the substance of facts and opinions to which the expert will testify. K.S.A. 60-226(b)(6)(A). In addition, if the witness is retained or specially employed to provide expert testimony, or is one whose duties as the party's employee regularly involve giving expert testimony, the disclosure must also state a summary of the grounds for each opinion. K.S.A. 60-226(b)(6)(B). The statute also addresses the duty to supplement incomplete or incorrect expert reports. K.S.A. 60-226(e). Such supplementation is limited by Kansas case law to newly discovered evidence or material inadvertently left out; it is not for the initial disclosure of an opinion on the central issue of the lawsuit. *Walder v. Board of Com'rs of Jackson County*, 44 Kan. App.2d 284, 287, 236 P.2d 525 (2010)(*rev. denied* Sept. 23, 2011). The main purpose of complete disclosure is to avoid unfair surprise to the other parties. See *Walder* at p.288.

After reviewing each of the supplemented expert reports provided by the City, as well as the pleadings filed by all of the parties, the Presiding Officer finds the supplemented expert reports of the following individuals contain the content required by K.S.A. 60-226(b) and therefore meet this procedural test: John Winchester, Scott Macey, Luca DeAngelis Don Henry, Joseph T. Pajor, Daniel Clement, and Paul McCormick.

The District also contends the City's supplemented expert reports are fatally deficient for failure to contain proper signatures. Although K.S.A. 60-226 requires signatures in ordinary civil litigation, they are not specifically required in this administrative setting. Moreover, the lack of signatures does not outweigh the fact that the contested reports contain the items required by K.S.A. 60-226 (b): the subject matter on which the experts will testify, the substance of facts and opinions to which the experts will testify, and a summary of the grounds for each opinion. As noted above, the main purpose of complete disclosure is to avoid unfair surprise. Thus, the lack of signatures on the City's supplemented expert reports is not fatal here.

The second inquiry regarding the admissibility of expert testimony is substantive, as set forth in K.S.A. 60-456(b), which states if scientific, technical or other specialized knowledge will help the trier of fact, a qualified expert may testify in the form of an opinion or otherwise if "(1) the testimony is based on sufficient facts or data; (2) the testimony is the product of reliable principles and methods; and (3) the witness has reliably applied the principles and methods to the facts of the case." The trier of fact's "overarching inquiry should be the scientific validity, evidentiary relevance and reliability" of expert testimony in determining admissibility. *Matter of Cone*, 309 Kan. 321, 327, 435 P.3d 45 (2019). K.S.A. 60-456(b) codified the standards for admissibility of expert testimony articulated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

The District asserts that the City's reports fail to show compliance with the *Daubert* standards for the admissibility of expert testimony [as codified at K.S.A. 60-456(b)]. As such, the District argues that the reports fail to show the following: that the witnesses' testimony is based on sufficient facts or data, that the testimony is the product of reliable principles and methods, and that each expert has reliably applied the principles and methods to the facts of the case. K.S.A. 60-456(b). The District further asserts that this alleged deficiency in the reports compels the exclusion of the reports and the expert testimony of the witnesses. The party moving for the exclusion of the reports bears the burden of proving this claim. See *Irvin v. Smith*, 272 Kan. 112, 31 P.3d 934 (2001).

Without expert depositions of any of the City's experts, this Presiding Officer is being asked to rely solely on the supplemented expert reports to find that the City's experts fail to meet standards of "scientific validity, evidentiary relevance and reliability". See *Matter of Cone* 309 Kan. at 327. This Presiding Officer declines to do so. The District's expectation exceeds the purpose of the reports. A full evaluation of substantive *Daubert*-level admissibility of expert testimony is typically enabled through the more comprehensive tool of depositions, or by questioning at the hearing. In the absence of either, and where the expert reports do not affirmatively show that the testimony would be invalid, irrelevant or unreliable, it is not appropriate, and perhaps an abuse of discretion, to determine as a matter of law, that the experts may not testify.

The District's expectation also exceeds the scope of the Order on Prehearing Motions. In finding the City's expert reports deficient, the Presiding Officer relied on the procedural requirements of K.S.A. 6-226(b)(6). Likewise, the order directed the City to supplement each of its expert reports to provide the opinions and/or conclusions reached by each expert and a summary of the grounds for each. This directive reflected the procedural parameters for avoiding unfair surprise found in K.S.A. 6-226(b)(6), not the substantive inquiry for expert testimony admissibility described in K.S.A. 60-456(b).

The City's supplemented expert reports for John Winchester, Scott Macey, Luca DeAngelis Don Henry, Joseph T. Pajor, Daniel Clement, and Paul McCormick meet the procedural directive of the Order on Prehearing Motions, and the statutory guidance found in K.S.A. 6-226(b)(6). It is not necessary that the reports also satisfy *Daubert*, as codified at K.S.A. 60-456(b).

It is important to note that each party bears the burden to establish the "scientific validity, evidentiary relevance and reliability" of the testimony of each of their expert witnesses, including the City's experts named above. Where depositions have not been taken, the hearing allows an opportunity to do so.



**Discussion and Conclusions re  
Admissibility of New Subject Matter and Rebuttal Material in Supplemented Expert  
Reports**

The District argues the City's supplemented expert reports contain rebuttal material relative to other parties' expert reports, as well as new subject matter on which the City's witnesses may provide expert testimony. The District contends this new material was beyond the scope of the order to supplement and should be stricken.

The Order on Prehearing Motions directed the City to supplement the existing expert reports with opinions and/or conclusions reached by each expert and a summary of the grounds for each. In reviewing the basis for this directive, the Order noted that supplementation of expert reports was generally for the purpose of newly discovered evidence or material inadvertently left out, not for the initial disclosure of an opinion on the central issue of the case. *Walder*, 44 Kan. App.2d at 287. The *Walder* case interpreted K.S.A. 60-226(e), which, as a provision of civil evidentiary law, is not binding in the administrative setting. Nonetheless, the Order contemplated that the City would add the noted elements (opinions/conclusions and summaries) to the existing content of the expert reports. As noted in the Order, the purpose of this directive was to avoid unfair surprise.

Daniel Clements' supplemented expert report contains a new rebuttal section, "Review and critique of the technical expert report submitted by Carl E. Nuzman P.E., P.Hg," with accompanying Attachment S.

Paul McCormick's supplemented expert report contains a new rebuttal section, "Review and critique of the technical expert reports submitted by George A. Austin P.E., L.S. of Aqueous Fortis Consulting and Dave M. Romero, P.H. of Balleau Groundwater, Inc." with accompanying Attachment N.

Don Henry's supplemented expert report contains new subject matter section, "Expert opinions based on scientific analyses: The requested adjustments to the lower Minimum Index Levels for recovery of ASR credits is in the public interest," with several subsections and accompanying Attachments K, L, M, and N.

Joseph T. Pajor's supplemented expert report contains the new subject matter section, "Expert opinions based on scientific analyses: The requested Aquifer Maintenance Credits and associated ASR credit accounting changes are in the public interest," with several subsections and accompanying Attachment E. (Pajor's Attachment E is identical to Henry's Attachment K.)

Luca DeAngelis' supplemental expert report contains the new subject matter section, "2.4 Groundwater Modeling Setup - 1% Drought Simulation," with two subsections and accompanying Attachment A.

The District requests this rebuttal content and new opinion content should be stricken. Alternatively, the District requests the ability to file rebuttal expert reports or to re-open the period allowed for deposing the City's experts. (Renewed Motion in Limine to Exclude Testimony of the City, pg. 6.) In its Response to the District's motion, the City states that, to the extent the District indicates that its objection can be satisfied by allowing it to serve rebuttal expert reports, the City does not object to that request. (City of Wichita's Response to Equus Beds Groundwater Management District No. 2's Renewed Motion in Limine, pg. 9.)

This Presiding Officer recognizes DWR's position that this "is not a typical adjudicative district-court matter," but is, instead, "a more relaxed administrative matter designed to marshal all applicable facts for consideration which, notably, will include post-hearing written comments by the formal parties and the public." Although this is generally true, some legal parameters remain, such as burden of proof, avoidance of unfair surprise, and proper exercise of discretion. Additionally, should this case become the subject of judicial review, a court will look to see if such parameters had been appropriately applied. Therefore, although the Presiding Officer need not apply strict evidentiary rules, she must strive to appropriately "marshal all applicable facts" within a valid legal framework that is fair to all parties.

Although the City's supplemented expert reports noted above contain material beyond the scope of the order to supplement, the challenged sections will not be stricken. The District's alternative request to take depositions of the City's expert witnesses is denied, as it impractical and unduly burdensome so close to the hearing date, especially considering the intervening holiday. Moreover, other parties emphasize the District's ample opportunity to take depositions before now.

However, in light of the District's other alternative request to submit rebuttal expert reports, coupled with the City's stated lack of objection to that request for rebuttal expert reports, the District's request to submit rebuttal expert reports is granted. The compressed schedule for doing so is unavoidable, given the proximity of the upcoming hearing. Should the District wish to submit rebuttal expert reports, such reports will be accepted no later than December 2, 2019. Such reports are not required; all parties will have reasonable opportunity to present rebuttal testimony during the course of the hearing.

## Order

1. GMD2's Renewed Motion in Limine to Exclude Expert Testimony of the City is granted as to the expert reports and expert testimony of Don Koci, Alan King, and Brian Meier.
2. GMD2's Renewed Motion in Limine to Exclude Expert Testimony of the City as to the supplemented expert reports of John Winchester, Scott Macey, Luca DeAngelis Don Henry, Joseph T. Pajor, Daniel Clement, and Paul McCormick is denied.
3. GMD2's request to strike new opinions and rebuttal content of the expert reports of Daniel Clements, Paul McCormick, Joseph T. Pajor, Don Henry and Luca DeAngelis is denied.
4. GMD2's request for the opportunity to submit rebuttal expert reports relative to the City's supplemented expert reports is granted; should GMD2 wish to submit such reports, they will be accepted no later than December 2, 2019.

**IT IS SO ORDERED, THIS 19th DAY OF NOVEMBER, 2019.**



Constance C. Owen  
Presiding Officer



**CERTIFICATE OF SERVICE**


On this 19th day of November 2019, I hereby certify that the original of the foregoing Prehearing Order on GMD2'S Renewed Motion in Limine to Exclude Expert Testimony of the City was sent by electronic mail to the following:

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Constance C. Owen  
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